No. 773

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In the Supreme Court of the United States

OCTOBER TERM, 1964

KWK RADIO, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a) is reported at 337 F.2d 540. The decision of the Federal Communications Commission (J. A. 53),[1] and its memorandum opinion and order denying reconsideration (J. A. 107) are reported at 34 F.C.C. 1039 and 35 F.C.C. 561.

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[1] "J. A." refers to the printed joint appendix filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1964. Petitions for rehearing by the panel which decided the case and for rehearing *en banc* were denied on September 19, 1964. The petition for a writ of certiorari was filed on December 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a licensee which has engaged in practices deliberately deceptive of the listening public is entitled to a prior warning under Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), before license revocation proceedings may be instituted.

STATUTES INVOLVED

Section 312(a) of the Communications Act of 1934, 48 Stat. 1086, as amended, 47 U.S.C. 312(a), and Section 9(b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), are set forth in the petition at pp. 2-3.

STATEMENT

The Federal Communications Commission revoked petitioner's license for standard broadcast (AM) radio station KWK, St. Louis, Missouri, upon finding, after a full evidentiary hearing, that two series of KWK broadcasts involving "treasure hunts" had been conducted in a deliberately deceptive manner, and rejecting the claim of mitigating circumstances

(J.A. 53-59; 34 F.C.C. 1039).[2] The relevant facts found by the Commission may be summarized as follows:

During the summer of 1960, with the knowledge of petitioner's president, KWK conducted two series of "treasure hunts." Both contests were under the direct supervision of the general manager of KWK, William L. Jones, Jr., who was also a vice president of petitioner. They were designed to achieve higher audience ratings and increased advertising. In each contest, a treasure was to be hidden in a public place, and was to be found with the aid of increasingly specific clues broadcast by the station. The finder was to receive a $1000 prize in the first contest, and $1500 in the second.[3]

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[2] The Commission (J.A. 54-55, 57) adopted the findings of the hearing examiner as to the fraudulent operation of the treasure hunts, and as to the inconvenience and hardship to Bonus Club prizewinners; the examiner's findings on these points (J.A. 69-77, 79-82) are therefore cited in the statement. While the examiner had recommended against revocation on the ground that the misconduct was that of the station manager alone (J.A. 105-106), the Commission held that the license should be revoked because the licensee was legally responsible for the wilful and fraudulent acts of its principal operating official and because KWK's principal stockholder and corporate officer had not taken reasonable precautions and had failed to cooperate fully with the Commission (J.A. 55-59).

The reproduction in the joint appendix of the Commission's decision (J.A. 53-59), its opinion on reconsideration (J.A. 107-110), and the examiner's initial decision (J.A. 64-106), are from the Commission's official reports, the pagination of which is also given.

[3] A local auto dealer agreed to sponsor the second contest

In each case Jones, together with one Hamel, the sales manager of KWK, withheld hiding the treasure for about three weeks, during which period the station broadcast clues purporting to indicate where the non-existent treasure had been hidden. In each instance the treasure was found the same day it was hidden (J.A. 80, 81). In the second contest, the clues indicated that the treasure was in Tower Grove Park in St. Louis, and an official of the park complained of damage to the park by would-be treasure finders. (J.A. 81). The station later paid the park over $900 for damage caused by treasure hunters (J.A. 91). The hearing examiner summarized the final day of the contest, when Jones and Hamel went to the park to look for a place to hide the treasure, as follows (J.A. 81):

> He [Hamel] found it was croweded and called Mr. Jones and advised him of the situation. Mr. Jones then returned to the park and he and Mr. Hamel selected a bench in the southeast section of the park in which to hide the treasure. The prize was then hidden under a slat in the selected bench. Mr. Jones then called KWK, and gave the announcer the final clues to broadcast on the air. He and Mr. Hamel then returned to their car which was parked in a position from which they could observe the general area where the prize was hidden. The clues were broadcast and indicated the precise bench where the prize was hidden. Immediately after the broadcast

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only to the end of the week in which the treasure was found. Additional clues were furnished to the sponsor, to be available to persons visiting the sponsor's showroom (J.A. 80-81).

> of the last clue, searchers converged on the bench where the prize was hidden. A disorder ensued, the police having to control the crowd and remove the individual who had the treasure.[4]

The Commission found (J.A. 55) that the conduct of the two treasure hunts was wilful and repeated, and constituted a deliberate fraud on the public. In considering whether there was mitigation in the claim that the licensee should not be held responsible for Jones' acts, the Commission found that the licensee had not only failed to exercise minimal precautions in the two contests (J.A. 56), but that it had also failed adequately to supervise a so-called Bonus Club contest conducted for about two years, in which vacation trips were awarded as prizes, and which were marked by extreme inconveniences to winning contestants. (J.A. 57, 67-79).[5]

The Commission also considered other mitigating factors raised by KWK, including the licensee's claimed cooperation with the Commission's investiga-

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[4] Jones (Tr. 1315-1317) and Hamel (Tr. 925-927, 930-932) testified that two clues were broadcast after the treasure was hidden. The first made reference to a particular arch and the second to the specific bench near the arch where the treasure was hidden. When the final clue was broadcast, approximately 500 to 1,000 people were gathered around the arch, many with portable and transistor radios tuned to KWK. As these people converged on the bench, fist fights broke out in a struggle for the treasure.

[5] Thus, contestants who won free 'millionaire's vacation trips" were denied space on planes in California, Las Vegas, and Hawaii during their trips, because they were given only "space available" travel credits. (J.A. 74-79).

tion, and the good character of Andrew M. Spheeris, the president of petitioner, who is also president and the largest stockholder of Milwaukee Broadcasting Co., which wholly owns KWK Radio, Inc. The Commission stated, however, that it was "not convinced that KWK's cooperation extended beyond what Mr. Speerhis believed to be desirable," noting that for a period of over five weeks, and despite the pendency of the proceeding, he had not divulged to the Commission or his own counsel the fact that he had been told of the fraudulent character of the treasure hunts (J.A. 57-58). Further, the Commission ruled that a general good reputation in the community of the licensee's principal cannot exculpate its wilful misconduct in the operation of a broadcasting station, which was in "palpable violation of the high trust imposed upon it as a broadcast licensee" (J.A. 58).[6]

The court of appeals affirmed the Commission in a *per curiam* opinion, stating that it had carefully reviewed the record, and that the record clearly supported the findings and conclusions of the Commission (Pet. App. 2a).

ARGUMENT

The petition for certiorari does not seek review of any important question of law which was presented to, and decided by, the court of appeals and which is therefore ripe for review under Rule 19 of the Rules of this Court.

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[6] The Commission denied reconsideration after holding another oral argument on its own motion. (35 F.C.C. 561.)

Petitioner's first point (Pet. 5-8)—that Section 9 (b) of the Administrative Procedure Act, 5 U.S.C. 1008(b), prohibited the Commission from instituting revocation proceedings without first giving petitioner a warning—is clearly insubstantial. That provision of the Administrative Procedure Act in terms authorizes revocation without an opportunity to achieve compliance "in cases of willfulness." The Commission found that petitioner's conduct of the treasure hunts was willful, and the court of appeals agreed (Pet. App. 2a). While petitioner's definition of willful as requiring "evil intent" is too narrow, it is clear that the deliberate fraud upon the public involved here was a case of willfulness under any definition.

Petitioner's second point (Pet. 9-14) is that Section 312(a) of the Communications Act did not authorize revocation here, because the acts complained of did not constitute "conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application" under Section 312(a)(2), or willful or repeated "failure to operate substantially as set forth in the license," under Section 312(a)(3). Petitioner reads Section 312(a)(2) as covering only pre-existing conditions unknown to the Commission at the time a first permit or license is granted, and contends that Section 312(a)(3) covers only the specific, technical terms of the license. The Commission upheld its authority under these subsections, rejecting KWK's contentions (J.A. 58-59). But petitioners never presented these statutory questions to the court below,

and, consequently, there is no decision of the court of appeals on these points to review.

In the court below, petitioner filed a principal brief, a reply brief and, after decision, a petition for rehearing *en banc*.[7] It argued three points, i.e., that the failure to give notice rendered the proceeding invalid under the Administrative Procedure Act (Brief, pp. 7, 11-22), that the treasure hunts were not fraudulent (Brief, pp. 7, 22-28), and that the revocation sanction was erroneous because it was too severe in the circumstances (Brief, pp. 7, 28-41).[8] In seeking rehearing, it addressed itself solely to the arguments that no willful conduct was involved and that there had been no fraud. Petitioner made no suggestion that there was any question in the case as to the Commission's view of the reach of Section 312(a)(2) and (3), and the lower court apparently saw no occasion to rule on it *sua sponte* under its power to notice plain error not raised by a party. Petitioner's present attempt to raise these points on the ground that they are of great significance (Pet. 14) is clearly an afterthought. The present petition is an inappropriate attempt to obtain initial review of the Commission's decision in this Court by way of a writ of certiorari.

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[7] We have lodged with the Clerk of this Court copies of petitioner's briefs below.

[8] While the brief below mentioned (p. 30) that the Commission had not found that KWK had violated the technical specifications of its license, this was in the context of arguing that, even if the public had been defrauded, revocation was too severe a sanction because the owners of KWK were not responsible.

Lawn v. *United States*, 355 U. S. 339, 362 n.16; *Helvering* v. *Minnesota Tea Co.*, 296 U.S. 378, 380; *Husty* v. *United States*, 282 U.S. 694, 701-702.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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